DYING DECLARATIONS.

The limitations on the admissibility of dying declarations are shown in the case of *State v. Thompson*, decided by the Supreme Court of Oregon and reported 88 Pac. 583. The accused was convicted of murder in the second degree and appealed from an alleged erroneous ruling of the court in admitting the dying declaration of his victim. The decedent was told by his physician that he had only a few moments to live. Preparatory to making the statements introduced in evidence, the decedent was asked what expectation of recovery he had, and he replied that he didn't know. The court held these statements were admissible as dying declarations.

The admissibility of dying declarations has been long recognized, but the law regarding them has not always been the same. Some of the very earliest cases show that such evidence might be admitted in civil suits, as when in an action on a deed, the dying declaration of a witness to its execution was admitted. *Wright v. Litlet*, 3 Burr. 1255. But in an action of ejectment reported in 17 St. Tr. 116, (1743) a distinction between the admissibility of such evidence in criminal and civil actions was pointed out and the necessity for admitting dying declarations in the latter was shown not to exist.

The modern doctrine regarding the admission of dying declarations insists upon the presence of well-defined circumstances at the time of the making of the declarations. They are only admissible in trials for homicide, *State v. Barker*, 28, Oh. St. 583; the death for which the accused is on trial must be that of the declarant. *Railing v. Com.*, 110 Pa. 103; the subject of the declarations must be the circumstances connected with the death for which the prosecution was instituted. *People v. Wong Chuey*, 117 Cal 624. It is only where these facts exist that statements of a dying declarant are admissible, and further, there must appear, preliminary to entertaining this evidence the fact that the declarant was in fear of impending death. *Mattax v. U. S.*, 146 U. S.; 140. Whether or not all these conditions are present must be decided by the court and then the evidence must be admitted or excluded accordingly.

That such declarations are only admissible in prosecutions for homicide is now well settled. This exception to the hearsay rule was originally made on the ground of necessity and it is only in criminal cases similar to the above that such necessity is now conceded to exist. It was said by Judge Ogden in *Donnelly v. State*, 26 N. J. L.; 617; "Such declarations are received as evidence from necessity, for furnishing the testimony which in certain cases is essential to prevent the manslayer from escaping punishment."

Another limitation recognized by the present doctrine is that the prosecution in which such evidence is to be admitted must have been instituted for the death of the person making the statements. Such dying declarations being admitted because of necessity in the case of secret murders, it is plain that the above

rule results naturally. *State v. Bohan*, 15 Kan. 418. Again the declaration sought to be introduced must concern the facts leading up to or causing or attending the injurious act in question. This rule excludes any narration that the declarant may attempt to state as to previous relations with the accused. His declarations are only admissible in so far as they explain the occurrence or fix the liability on some person. In *People v. Smith*, 172 N. Y., 242, the court in discussing the dying declarations introduced in that case, speaks of such declarations as admissible as part of the *res gestae*. It does not seem essential to the dying declarations now under discussion that they should be part of the *res gestae*. Statements of this nature to be admissible should undoubtedly explain the nature of the assault, but that they should accompany the act so closely as to be part of it would not seem to be an essential characteristic of this kind of evidence. Words which accompany and explain an act are admissible where the principal fact is admissible and no limitations are placed on them as is done in the case of dying declarations.

Another very important qualification to be noticed in this connection is that the declarant must have made the statements sought to be introduced with a realization and belief that death was inevitable. This qualification must be present, but it is not necessary that the person should really die soon after the making of the statements. *Com. v. Cooper*, 5 Allen 495. A declarant under these circumstances is as likely to tell the truth as if he were under the sanction of an oath. In fact, the fear of death supplies the office of the oath. *Tracy v. People*, 97 Ill. 106. The declarant must believe that dissolution will soon result, in order that full faith should be given his words. *State v. Welsor*, 117 Mo. 570. The trial court determines whether or not such fear exists in the mind of the declarant from all the circumstances of the case. *State v Cronin*, 64 Conn. 293.

A few courts manifest a tendency to apply these rules very narrowly. Especially in determining whether or not the declarant fear a speedy dissolution, have they been very particular and fine distinctions drawn which do not meet the approval of many of the students of evidence. Undoubtedly in many jurisdictions, the fact that the declarant, as in the principal case, said that he didn't know what his chances for recovery were, would be enough to exclude the evidence as not being made in fear of impending death, and it would seem that a strict application of these rules was wise, as the accused if deprived of many well recognized privileges by the admission of these statements under any conditions.

FEDERAL PRACTICE—WAIVER OF JURISDICTION—RECOUPMENT.

The United States Supreme Court, in the recent decision in *Merchant's Heat & Light Company v. J. B. Clow & Sons*, 204 U. S. 286, adds an important contribution to the law of pleading and practice in the Federal Courts.

The suit was brought in the United States Circuit Court for the Northern District of Illinois and was based on a breach of contract